IN THE

SUPREME COURT OF THE UNITED STATES.

October Term, 1942.

No. .....

FRANK VALENTI, *Petitioner,*

v.

UNITED STATES OF AMERICA, *Respondent.*

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

The District Judge denied a motion for a new trial and the opinion of Judge Clark for the Circuit Court of Appeals has not been reported but is printed at pp. 285-295 of the Record.

Jurisdiction.

Reference to the statute under which the jurisdiction of this Court is invoked, and a statement of the questions presented, as well as a statement of the case, will be found in the petition.

Summary of Argument.

All of the circumstances relied upon by the Government to show appellant's guilty association with the alleged con-

spiracy are as consistent with the hypothesis of innocence as with guilt. Practically all the defendants are closely related to one another either by blood or marriage (398, 436, 438, 490, 491, 552, 553). Association among the defendants to much greater extent than is shown by the record under review could be explained by the relationship existing among them. Throughout the year in which agents of the Government constantly followed petitioner, not a scintilla of evidence was found which might even tend to show that he was connected with any wrongful conspiracy.

The Trial Court, prior to the decision in Braverman vs. U. S., 63 S. Ct. 99, charged that the three year Statute of Limitations applied, and the jury may have ruled out overt acts 2 and 5. As to the small repair job at the garage a sufficient answer is that sizeable discounts were allowed when cars were brought in the names of either Joseph Valenti or Frank Dimino. As to the finding of petitioner's telephone number at the East Eden still a ready explanation is that petitioner bought bankrupt stock and his telephone number might well have become known through circulation as a result of his business connections (714, 715, 721, 722). While defendant did not take the stand the proof is not convincing that appellant had no regular occupation. Through his wife he was an owner of large real estate holdings and the government agent admitted that he dealt in bankrupt stock (547-548). Certainly there is nothing sinister in having an unlisted 'phone as many professional and business men (179-183-282 supplemental record) have such 'phones. And but one call was made from home of Conti, an acquitted co-defendant, to home of petitioner (279 Supplemental record).

The Court below refers to (291) testimony that petitioner rode with other members of group carrying tools of

trade. This is not sufficient to warrant a finding he was connected with the operation of a still. Also, similar pumps are used on a farm (F. 239) and to test specific gravity of liquids.

Petitioner was seriously prejudiced by the improper statement of the experienced Government Agent Maguire discussed under Point II.

ARGUMENT.

POINT I.

The judgment below is inconsistent with the determination in other Circuit Courts of Appeal to the effect that facts creating mere suspicion of guilt will not support a conviction of conspiracy.

In the Circuit Court the petitioner urged the holding that all inferences drawn from facts in evidence must be consistent only with guilt and inconsistent with every reasonable hypothesis of innocence. This is the holding in *U. S. vs. Kassin*, 87 F. (2nd) 183, 184.

The Court held (fol. 289) that such a rule of proof is so burdensome that, if literally followed, it would operate to protect the shrewder criminal. The Court goes on to state that this does not represent the majority rule and cites state cases to support their point, one a recent Conn. case, State vs. Murphy, 124 Conn. 554. The case of United States vs. Becker, 62 F. 2d 1007, is not decisive of the present state of facts and L. Hand, *J.*, admits that other Circuits have decided a contrary doctrine that no separate charge is to be

made suggesting that circumstantial evidence is on a different and lower plane than other forms of evidence.

All the decisions cited by the Circuit Court (fol. 290) are much stronger as far as the facts are concerned than the present case. The decisions in:

Pollock vs. U. S., C. C. A. 79 Fed. (2nd) 872,
De Luca vs. U. S., C. C. A. 298 Fed. 412,
Wright vs. U. S., C. C. A. 227 Fed. 855, 857,

support the holding in Kassin vs. U. S., *supra*.

POINT II.

The Trial Court committed reversible error in receiving prejudicial testimony of government agent Maguire, over appellant's objection and exception, that Maguire stated to petitioner's brother and son upon the occasion when they were arrested: "Is this a nice place for you two kids to be? I would give a thousand dollars to have your father where you are. I do not get my fun in arresting nineteen year old boys".

This remark had an extremely prejudicial effect upon the jury. Judge Clark inadvertently incorrectly stated (290) that the trial court appears never in fact to have ruled on the matter. In the Supplemental Record at bottom of page six and at top of page seven, it was stipulated by the United States Attorney that the Court *overruled the objection* and that an *exception was duly taken.*

The situation was much like that in the leading case of People vs. Robinson (273 N. Y. 438) where the New York Court of Appeals reversed a conviction. Judge Lehman said, at pp. 443-4, in regard to a similar remark, "More

serious harm resulted from the examination of the witness Abramson. As we have pointed out, he is an attorney, appointed senior securities accountant after passing a civil service examination, and attached to the Department of Law. A jury might reasonably be impressed by his qualifications and give weight to his opinions."

In this case, Maguire, the Government agent, had been to law school two years (627-628) and was an experienced investigator.

The prosecutor conducted his summation along the same prejudicial line (~~815~~), for the Trial Judge, at the very outset of his charge, said:

> "Members of the jury, the Government's attorney has made some reference in his examination to the big fellows or ring-leaders and the small fry who worked at the stills. I want to say to you at the outset that the rules of law and the basis that you should apply in considering the guilt or innocence of all the defendants is exactly the same, whether he be a ring-leader or small fry. Each is entitled to a fair and impartial consideration of his case, no more and no less." (750.)

The case was close as to this petitioner. The jury deliberated nearly twenty-three hours (791-797). Certainly the point was not an afterthought, as in United vs. Manton, 107 Fed. (2nd) 834, 847 (cited below), as the objection appeared in the motion for a new trial and in the assignments of error. (815.)

As to what evidence is prejudicial the Second Circuit has laid down a peculiar test. In United States vs. White, 124 F. (2nd) 181, 186, that Court said:

> "No judge in so extended a trial can avoid an occasional ruling that on reflection he will see to have been

wrong; but, unless they cut off some real substantial aspect of the truth, or let in too distracting issues, they are not important. And in this connection we wish to suggest that the disposition to rule out evidence because it offends against some canon of the law of evidence is to be discouraged; admission seldom does any harm, while exclusion often proves extremely embarrassing in sustaining a judgment fundamentally just."

It is respectfully submitted that this court has never applied so extreme a rule. It certainly is not the law of New York (see *People v. Nitzberg*, 287 N. Y. 183).

As to the Circuit Court's (fol. 292) holding that defense counsel by his long cross-examination of Maguire had waived the point now raised, the Court overlooked the practical exigencies of the situation. A party does not waive his objection and exception by attempting to disprove the matters testified to or by seeking to prove facts inconsistent with them. "A party excepting to the admission of testimony is not bound to concede its truth, or to refrain from combating it, in order to retain his exception."

Martin vs. N. Y. N. H. R. R., 103 N. Y. 626, 630;
Wigmore on Evidence (3rd Ed. 1940) Sec. 18, p. 344, and note 34.

The case of United States vs. Gruber, 123 F. (2nd) 307 (cited below) is not controlling or in point. There it was held that since defendant took the stand he waived any error that might have been made as to the cross examination of other witnesses. Here petitioner did not take the stand and cannot be held to have waived under the circumstances.

It is respectfully submitted that we not only have a conflict of decisions but also a question of general public im-

portance whether a ruling on evidence handed down by the New York Court of Appeals should be followed.

In the instant case, the proof against petitioner was very meager, the error in evidence was substantial, and the question of substantive law involved is of general public importance in these days of so many drag-net conspiracy indictments.

A Writ of Certiorari should therefore issue.

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